

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 3125/2014

In the matter between:-

SUN INTERNATIONAL MANAGEMENT LIMITED

1st Plaintiff

MANGAUNG SUN PROPRIETARY LIMITED

2nd Plaintiff

and

NICOLAS GEORGIOU N.O.

1st Defendant

MAUREEN LYNETTE GEORGIOU N.O.

2nd Defendant

JOE CHEMALY N.O.

3rd Defendant

HEARD ON: 18 JUNE 2015

JUDGMENT BY: KRUGER, J

DELIVERED ON: 25 JUNE 2015

- [1] This is an opposed application to amend plaintiff's particulars of claim. Plaintiffs caused summons to be issued against the defendants on or about 10 July 2014 for payment of some R13 million. In the particulars of claim plaintiffs referred to a written "Initial Agreement" of 28 July 2003. The terms of the initial agreement are stated in paragraph 8 of the particulars of claim. Plaintiffs also referred to a written "Operating Management

Agreement” which was prepared during or about September 2005 and the terms thereof on which plaintiffs rely are stated in paragraph 12 of the particulars of claim. In paragraph 14 the plaintiffs allege that a tacit agreement came into force between the parties and plead the terms of the tacit agreement in paragraph 15.

- [2] The defendants gave notice under Rule 23(1) of their intention to except to the particulars of claim as being vague and embarrassing on 9 February 2015. As a result thereof plaintiffs gave notice of their intention to amend on 3 March 2015. The defendants objected to the intended amendment by means of a notice dated 16 March 2015. Plaintiffs launched this application for leave to amend in terms of Rule 28(4) on 30 March 2015, seeking the court’s leave to amend as set out in the notice dated 2 March 2015. Defendants filed a notice to oppose this application on 15 April 2015.
- [3] Mr Hefer, for plaintiffs, says that the amendment seeks to clarify the conduct on which the plaintiffs rely for the coming into existence of their tacit agreement on which they rely. The legal principles relating to amendments are set out in Mr Hefer’s heads of argument. The granting or refusal of an application for the amendment of a pleading is a matter for the discretion of the Court which is to be exercised judicially in the light of all the facts and circumstances before the Court (**GMF Kontrakteurs (Edms) Bpk and Another v Pretoria City Council** 1978 (2) SA 219 (T) at 222B – D). The tendency of our courts has been to allow amendments where this can be done without prejudice to the other party (**GMF Kontrakteurs (Edms) Bpk and Another v Pretoria**

City Council (*supra*) at 222F – 223C). The approach of the courts to amendments has been stated in **Bankorp Ltd v Anderson-Morshead** 1997 (1) SA 251 (W) at 253 where Flemming DJP says at 253F that an amendment will be granted if a party deems it necessary to bring its real case before court. In **Cross v Ferreira** 1950 (3) SA 443 (C) at 449G – H van Winsen AJ (as he then was) said that, while the practice did not appear to be entirely uniform on this point, the weight of authority seems to favour the view that if the pleading as sought to be amended would be excipiable, this affords a ground upon which the court may in the exercise of its discretion refuse the application for the amendment.

- [4] It is important to bear in mind that I am not now dealing with an exception. An amendment should be refused on the ground of excipiability thereof only if it is clear that the amended pleading will and not may be excipiable:

“If the excipiability of the pleading is merely arguable or can be cured by the furnishing of particulars, then it is proper to grant the amendments where the other considerations are favourable.”

(Herbstein and Van Winsen, **The Civil Practice of the High Courts of South Africa**, 5th Edition (2009) Vol 1, 683).

- [5] The main thrust of the defendants’ objection is that the amendment will render the particulars of claim excipiable. Mr Hefer says the excipiability is merely arguable and can be cured by furnishing further particulars, and in such circumstances it is proper to grant the amendment. Plaintiffs’ contention is that a tacit agreement came into effect, and the terms of the tacit agreement correspond

with the terms of the Operating Management Agreement, and plaintiffs' version is clear and there is no vagueness or embarrassment.

- [6] Mr Van Rhyn, for defendants points out that the predominant factor which has shaped the courts' policy regarding amendments is a positive endeavour to encourage a full and proper ventilation of the real dispute between the parties, with reference to **Robinson v Randfontein Estates G M Co Ltd** 1925 AD 173 at 198. The defendants' objection to the proposed amendment mainly concerns the attempt to introduce a tacit agreement, apart from the Initial Agreement and the Operating Management Agreement. Defendants contend that the amendment seeks to vary, and/or contradict the terms of those two written agreements.
- [7] Mr Van Rhyn points out that the amendments sought by the plaintiffs in the notice of amendment merely serve to rectify clerical errors, and defendants do not object to those corrections. The point Mr van Rhyn makes is that the amendments do not address the grounds relied upon by the defendants in the rule 23(1) notice to remove the cause for complaint, and therefore the proposed amendments will be an exercise in futility.
- [8] A central objection of the defendants is that the terms of the tacit agreement as set out in paragraph 15 of the particulars of claim differ from the terms of the written Operating Management Agreement contained in paragraph 8 of the particulars of claim. The objection is that plaintiffs do not aver that the Operating Management Agreement purports to be the Final Agreement

contemplated in the Initial Agreement. Defendants say that they cannot ascertain whether the conditions as set out in the Initial Agreement were fulfilled or whether the Initial Agreement came to an end and if so when. To this extent defendants contend that plaintiff's particulars of claim lack particularity and are vague.

- [9] Defendants contend that when an express contract is alleged (in this case two written contracts) the terms of an alleged further tacit contract may not be pleaded nor may evidence to prove a tacit contract be placed before the court, with reference to **Roos v Engineering Fabricators (Edms) Bpk** 1974 (3) SA 545 (A). The **Roos** case dealt with the situation where the plaintiff on appeal sought to introduce a tacit contract where it had relied on a partly written and partly oral contract in the court *a quo*. In this case defendants allege that they cannot ascertain whether any reliance is placed on the written contracts or whether the written contracts were cancelled prior to the conclusion of the tacit agreement.

- [10] The plaintiffs plead the tacit agreement in paragraph 14 of the particulars of claim.

- [11] The parties to the two written agreements were as follows:

11.1 The Initial Agreement

Sun International SA (SISA) and The N Georgio Trust.

The N Georgio Trust is the defendant in these proceedings, but SISA is not a party to these proceedings, as pointed out in defendants' Rule 23(1) notice.

11.2 The Operating Management Agreement

The N Georgio Trust and Sun International Management Limited and Mangaung Sun (Pty) Ltd.

This agreement has not been signed. The N Georgio Trust is the defendant and the other two entities are the first and second plaintiffs. The particulars of claim allege that the Operating Management Agreement was prepared and furnished to the defendant trust, and the parties have at all material times given effect to the Operating Management Agreement. It would seem that, because it has not been signed, plaintiffs do not regard it as a written agreement. Plaintiffs say that the parties have acted according to the terms of the Operating Management Agreement and quote its terms as being those of the tacit agreement they rely upon.

- [12] Mr van Rhyn contends that clause 18 of the Initial Agreement (POC1) provides that the rights and obligations accorded to SISA in that agreement can be allocated to the plaintiffs. He says because of that allocation, the plaintiffs have become parties to POC1, and it constitutes a written agreement between the plaintiffs and the defendant. Mr Hefer says that POC1 gave rights to the plaintiffs, that is why it is attached. The plaintiffs did not become parties to POC1. Mr Hefer's submission is correct. The fact that the particulars of claim contain the allegation in para 13.1 that the first plaintiff was a subsidiary, affiliate, associate or nominee of SISA does not mean that the plaintiffs allege that they became parties to POC1. POC2 was not signed and is not described as a written contract by the plaintiff in the particulars of claim. Plaintiffs do not rely on any written contracts. Plaintiffs rely on the content

of the unsigned POC2 as being an embodiment of the tacit terms plaintiffs rely upon.

- [13] With reference to **Pillay and Another v Shaik and Others** 2009 (4) SA 74 (SCA) Mr Van Rhyn submitted that a party can only rely on *quasi mutual* consent if the parties conducted themselves in terms of that agreement. He further submitted with reference to Christie's, **The Law of Contract in South Africa** (6th Edition) (2011) 174 that no tacit terms can be imported in contradiction to an express term.
- [14] In this case the plaintiffs do not rely on any written contract, but only on what they call a tacit contract, of which the terms are embodied in POC2. There is no reason to refuse the amendment. The amendment does not introduce the tacit agreement. The particulars of claim in their original form already contained the tacit agreement. It cannot be said that the particulars of claim as amended will be excipiable. The need for amendment was brought about by mistakes made by the plaintiff. It cannot be said that the defendants acted in bad faith in opposing the amendment or that opposition was unreasonable (**Gcanga v AA Mutual Insurance Association Ltd** 1979 (3) SA 320 (ECD) at 328H – 329B).

ORDER

1. Plaintiffs' application to amend is granted.
2. Plaintiffs are ordered to pay the costs of this application.

A. KRUGER, J

On behalf of plaintiffs:

Adv JJF Hefer
Instructed by:
McIntyre & Van der Post
BLOEMFONTEIN

On behalf of defendants:

Adv AJR Van Rhyn SC
Instructed by:
E G Cooper Majiedt Inc
BLOEMFONTEIN

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